SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 5 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 377

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

CITY OF MOBILE,
Appellee.

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT.

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St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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OCTOBER TERM, 1968.

No. .....

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

CITY OF MOBILE,
Appellee.

STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of the Rules of the Supreme Court of the United States, appellant submits herewith this statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Alabama entered in this cause.

I.

OPINION BELOW.

The opinion of the Supreme Court of Alabama in this case has not yet been reported, either officially or unofficially. A copy of the opinion, however, is attached hereto as Appendix A.

II.

JURISDICTION.

1. This was a suit filed in the circuit court for the thirteenth judicial circuit of Alabama (Mobile County) for Declaratory Judgment authorized by Title 7, Code of Ala., Art. 12, Sec. 156-168, and an injunction, by Appellant, a taxpayer, against the City of Mobile, to determine the validity of a recently enacted city photographer's license, and, *pendente lite,* restrain the enforcement of the license, including its criminal provisions. When the City agreed to withhold enforcing the license *pendente lite,* this aspect of the Bill of Complaint was abandoned. The City's demurrer to the Bill was sustained. After further amendment, the City re-filed its demurrer, which was sustained, and the Bill dismissed. From this final decree, taxpayer appealed to the Supreme Court of Alabama.

2. On the 13th day of June, 1968, the Supreme Court of Alabama affirmed the decree of the circuit court, and it is this judgment which is sought to be reviewed on this appeal, and for which a Notice of Appeal was filed with the Clerk of the Supreme Court of Alabama on the 8th day of July, 1968. No application for rehearing was filed in that Court, and its judgment is now final.

3. The statutory provision believed to confer on this Court jurisdiction of this appeal is

28 U. S. C., sec. 1257 (2).

4. Among the cases believed to sustain the jurisdiction of this Court in this case are:

1.

Decision on Taxpayer's Rights Under the Federal Constitution Cannot Be Avoided in State Courts by Spurious Application of State Rules.

Terre Haute & Indianapolis R. Co. v. Indiana, 194 U. S. 579, 589 (1904);
Ward v. Love County, 253 U. S. 17, 22 (1920);
First Nat. Bank v. Anderson, 269 U. S. 341, 346 (1926);
Allied Stores v. Bowers, 358 U. S. 522, 525 (1959).

2.

Licenses Used to Discriminate Against Interstate Commerce Are Invalid Under the Commerce Clause.

Portland Cement Co. v. Minnesota, 358 U. S. 450, 458 (1959);
Sprout v. South Bend, 277 U. S. 163, 171 (1928).

3.

Non Discriminatory Licenses on Interstate Commerce Are Invalid Under the Commerce Clause.

Leloup v. Port of Mobile, 127 U. S. 640, 648 (1888);
Crutcher v. Kentucky, 141 U. S. 47, 58 (1891);
Spector Motor Service v. O'Connor, 340 U. S. 602, 608, 609 (1951).

4.

The Right of a State to Fractionalize Interstate Activity and License Essential Components Should Be Finally Determined by This Court in This Case.

(1) The Decision of the Supreme Court of Alabama on This Question Is Probably Wrongfully Decided.

Nippert v. Richmond, 327 U. S. 416, 423 (1946).

5.

A Flat Per Diem Admission Privilege License Cannot Be Imposed on Interstate Activity.

West Point Grocery Co. v. Opelika, 354 U. S. 390 (1957);
Leloup v. Port of Mobile, 127 U. S. 640, 648 (1888).

6.

The Overwhelming Weight of Authorities Hold That Such Privilege Licenses as Are Here Involved Are in Violation of the Commerce Clause.

Olan Mills, Inc. v. City of Tallahassee, ... Fla. ..., 100 So. 2d 164 (1958), **cert. den.** 359 U. S. 924.

7.

Privilege Licenses Enforceable With Criminal Sanctions Must Satisfy Substantive Due Process.

Raley v. Ohio, 360 U. S. 423, 438 (1959);
Ashton v. Kentucky, 384 U. S. 195, 200 (1966);
Bates v. Little Rock, 361 U. S. 516, 526 (1960).

5. The City License Schedule sought to be imposed on taxpayer's activities was City Ordinance 31-083, Section One, paragraph (d), which had been added to the remainder of the Schedule on August 31, 1965. The entire schedule is:

An Ordinance Further Amending Section One of the License Code of the City of Mobile, Alabama, Said License Code Being Duly Adopted on December 21, 1954.

31-083 1965

Be It Ordained by the Board of Commissioners of the City of Mobile, that the license Code of the City of Mobile for the year 1955 and each succeeding year as amended, is hereby further amended by changing sub-section of

Section One of the said License Code in the following particulars:

Section One: The paragraph numbered three hundred and nine and entitled "Photographers" is hereby amended to read as follows:

309. PHOTOGRAPHERS:

(a) A studio photographer is hereby defined to be every person, firm or corporation maintaining a studio within the City for the purpose of taking therein, personally or through his or its agents, partners, or employees, photographs of persons at such studio, and every person, firm or corporation maintaining in any one established place within the City for at least one year complete equipment for the taking of photographs, including all finishing processes, whether inside or outside of such place; and shall pay an annual license as follows:

Doing less than $5,000 gross annual business ..	25.00
$ 5,000.00 and less than $10,000.00	50.00
$10,000.00 and less than $15,000.00	75.00
$15,000.00 and less than $20,000.00	100.00
$20,000.00 and less than $25,000.00	125.00
$25,000.00 and less than $30,000.00	150.00
$30,000.00 and over	175.00

(b) In addition, photographers defined above who go about the City of Mobile, Alabama, taking photographs and using an animal or device as a prop 100.00

(c) In addition, each photographer taking photographs of pedestrians on the streets in the City of Mobile and handing to said pedestrians a card or other paper stating the terms of purchase and the place where the photograph may be obtained shall pay an annual license tax of 100.00

(d) Photographers, or persons, firms or corporations taking photographs or offering photography service for compensation, who do not qualify as "Studio Photographers" defined in (a) above, and who are neither Tran-

sient nor Itinerant Photographers as defined in Sec. 27-28, Mobile City Code (1955), each, per day $50.00

(e) All other persons, firms or corporations taking photographs for compensation within the City are hereby defined to be Transient Photographers.

Transient Photographers $500.00

(f) No person shall engage in the business of transient photographer without first having obtained a license to do so, which license shall be granted upon payment of the license tax as herein provided.

When one or more persons are employed to take photographs for any such transient photographer, a separate license shall be obtained for each employee.

(g) Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor. Each day upon which such person, firm or corporation shall violate this section shall be deemed a separate offense.

(h) And in addition, film developing, photographic supplies and cameras: same as Merchants.

Section Two: This ordinance shall be effective on the date of its adoption and shall remain in full force and effect and apply to each calendar year thereafter from year to year.

Section Three: Each and every provision of this ordinance is hereby declared to be an independent provision and the holding of any provision hereof to be void and invalid shall not affect any other provision hereof, and it is hereby declared that the other provisions of this ordinance would have been enacted regardless of any provision which might have been held invalid.

Adopted: August 31, 1965.

Richard L. Smith,
City Clerk.

III.

QUESTIONS PRESENTED.

Taxpayer is engaged in the business of soliciting orders for and taking baby pictures throughout the country, out of Charlotte, North Carolina, operating in and using the facilities of a nation-wide chain of moderate priced department stores, J. C. Penney Company. The City of Mobile, Alabama, sought to impose a discriminatory per diem privilege license tax on taxpayer for these activities, with threats of criminal prosecution of taxpayer's employees. The taxpayer filed a suit for declaratory judgment to protect its rights guaranteed under the Federal Constitution against the license. The questions presented are:

(1) May the State court deprive taxpayer of protection for its constitutional rights by a spurious application of the rule of no standing to avoid considering the protection of taxpayer's constitutional rights?

(2) Whether or not taxpayer's activities in interstate commerce are subject to a discriminatory, per diem admission privilege license tax as a condition precedent to the taxpayer's engaging in such business in the City of Mobile;

(3) Whether or not the unbroken chain of interstate activities here involved may be fractionalized into parts on which city licenses may be imposed.

(4) Whether or not taxpayer is subject to a prohibitive, vague and imprecise license with criminal sanctions for interstate activity, which license was enacted for and has been applied only to taxpayer.

IV.

STATEMENT OF THE CASE.

In 1963, Taxpayer came to Mobile to engage in the business of taking .59¢ baby pictures on the premises of J. C. Penney Company, a medium-priced department store, under arrangement previously made between the parties. The City demanded of taxpayer a transient photographer's license for $500.00 as provided in the schedule quoted above. Taxpayer then retained counsel and this $500.00 was refunded to taxpayer under an agreement that J. C. Penney obtain a "studio photographer's" license. Thereupon, J. C. Penney took out a "studio photographer's" license in 1963, and it has taken out this license yearly thereafter, including the year here involved.

On Aug. 31, 1965, without prior notice to taxpayer or J. C. Penney, the City amended the photographer's license by adding what is now paragraph (d). Taxpayer was informed that this was the result of activities of local photographers who were unable or unwilling to meet the competition of taxpayer's prices for baby pictures, and this paragraph (d) was drafted not to raise revenue for the City but for the purpose of excluding taxpayer from doing business in Mobile.

After advertising a visit to Mobile for the period Oct. 12-16, 1965, but being without knowledge of the amended photographer's license, taxpayer's employee-photographer came to Mobile on Oct. 12, 1965. This employee was met by a license officer of the City and presented a bill for this license for the five days' operations yet to be had. Actually, the bill was made out to "J. C. Penney Co.," but it was for taxpayer's activities about to begin, and it was given to taxpayer's employee. Upon failure to pay this tax bill, taxpayer's employee was threatened with criminal prosecution unless this bill was paid. As a result of this, this suit was brought.

Thereupon, it was agreed between taxpayer and the city that if the court held this license constitutionally applicable to taxpayer's activities, then taxpayer, not J. C. Penney, would pay this tax to the city with interest, for every day's operation by taxpayer from Oct. 12, 1965, to the date of such decision. For this the city agreed not to arrest or threaten to arrest any employees of appellant operating in the city for this paragraph (d) license pending such court decision. That agreement is still in effect, and taxpayer is still operating in Mobile at regular intervals. Thereupon, taxpayer made no further effort to obtain an injunction *pendente lite* against the city's enforcement of this license against taxpayer.

The Bill of Complaint alleges that taxpayer was engaged in the photography business in Charlotte, North Carolina, specializing in photography of children. It had no office, inventory, developing laboratory of agent in Alabama. J. C. Penney Company was a department store which entered into an agreement for taxpayer to engage in taxpayer's photography work in the Penney stores, one of which was in Mobile. The dates of visits by taxpayer's photographers were fixed by the local Penney store manager. Newspaper advertisements were run by Penney, but its cost was deducted from the gross receipts. Taxpayer prepared postal cards notifying its customers of the visits, which were mailed out by Penney.

Taxpayer's photographers then came to Mobile, solicited orders for pictures, took pictures, returned the exposed film to Charlotte, with the customers' orders for pictures, and if the orders were accepted, the pictures were developed, printed and finished. The finished pictures were returned to the Penney store, and they were paid for and picked up by the customer. The payments were made to the Penney employees only, and not to taxpayers' photographers or agents.

Penney retained 12½% of the receipts as its commission, and after deducting expenses, remitted the balance to taxpayer. Penney did no photography work in Mobile. This was done by taxpayer on Penney's premises, though subject to Penney's store rules as to hours, time, place, etc., of taking the pictures.

This was single-visit photograph, as distinguished from three-stage photography engaged in by Olan Mills as shown in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961).

The justiciable controversy alleged in the Bill expressly raises the federal questions, posing to the circuit court:

> "(a) Whether or not plaintiff is engaged in interstate commerce?
>
> * * * * * * *
>
> (e) Whether or not the application of such a license tax to plaintiff violates the Commerce Clause of the Federal Constitution?
>
> (f) Whether or not the license tax or its application to plaintiff violates the due process or equal protection clauses in the State or Federal Constitution?"

After agreeing to withhold criminal proceedings against taxpayer's employees for this license for taxpayer's promise to pay the city the license due, if any, under this paragraph (d), the city demurred to the Bill of Complaint on the ground that since the tax bill attached as an Exhibit to the Bill was addressed to J. C. Penney, therefore, it did not appear that the city claimed of taxpayer any tax under this license notwithstanding allegations to the contrary in the Bill. This demurrer was sustained. The Bill was then amended to allege:

> (1) J. C. Penney Company was not in the photography business and could not owe a license under paragraph (d).

(2) J. C. Penney Company was licensed as a "studio photographer" and could not owe a license under this paragraph under the express terms of the license schedule.

(3) Taxpayer was the real party in interest under the agreement with Penney.

(4) The city knew that taxpayer was the real party in interest, as shown from correspondence attached as exhibits to the Amendment.

(5) Paragraph (d) was adopted by the City to cover taxpayer's (not Penney's) activities.

(6) The naming of Penney in the tax bill was for the purpose of avoiding judicial review of this license.

The re-filed demurrer to the amended Bill was sustained and the suit was dismissed.

In the meanwhile, though taxpayer had been doing business as noted above in seven other cities in Alabama without any effort having been made by the state to impose any state and county privilege license on taxpayer's operations, suddenly the State Department of Revenue made assessments against taxpayer for such license for the then current year, and for escaped licenses for as far back as the State statutes would permit. The result of that effort is found in the related case of **Dunbar-Stanley Studios v. Alabama**, also on appeal to this Court. The conclusion seems inescapable that this action on the part of the State was instigated by the same parties and with the same motive which is behind the action of the city in this case, viz., to eliminate competition from taxpayer in Alabama.

This case was appealed to the Supreme Court of Alabama where it was argued orally before the Division of that Court consisting of Chief Justice Livingston, and

Justices Lawson, Goodwyn and Coleman. However, contrary to the legislative direction contained in Title 13, Code of Ala., Sec. 7, the case was submitted to Supernumerary Circuit Judge B. W. Simmons, who wrote the Opinion in this case, concurred in by the members of the other Division of that Court who had not heard the oral arguments.

Judge Simmons held in the Opinion written by him that since the city had billed J. C. Penney for this license as shown on the Exhibit to the Bill, therefore, taxpayer could not raise the federal questions concerning the constitutionality of this license, regardless of the allegations of the Amended Bill. This was in direct violation of the well established rules of that Court that

(1) On demurrer, the allegations of the Bill of Complaint must be taken as true.

Winston v. Winston, 276 Ala. 303, 306, 161 So. 2d 588 (1964).

(2) In the absence of express agreement of the parties (which was not made in this case), a demurrer is not to be sustained to a Bill for Declaratory Judgment concerning the validity of a city license.

Moore v. City of Fairhope, 275 Ala. 506, 156 So. 2d 366 (1963);

Sperry & Hutchinson v. City of Fairhope, 270 Ala. 582, 120 So. 2d 752 (1960).

V.

THE QUESTIONS ARE SUBSTANTIAL.

At its place of business in Charlotte, North Carolina, taxpayer originated a specialty in taking 5 x 7 baby pictures at .59¢ each. The specialty developed into a nation-

wide business in conjunction with the J. C. Penney Company department stores. Its business is interstate in its nature and scope. It is now and always has collected and remitted local sales taxes where applicable. But the City of Mobile is now standing in the door to exclude taxpayer by requiring a license which had been applied only to taxpayer who is engaged in interstate activity. Furthermore, the license, $50.00 per day, is completely confiscatory. No one could do photography business in Mobile at $50.00 per day. There isn't that much photography business in Mobile. Hence, judicial relief was essential against this discriminatory, confiscatory privilege license on an interstate activity.

Though the City agreed to accept the tax from taxpayer to avoid insistence for an injunction *pendente lite,* when time came to respond to litigation, the city suddenly decided that they never knew taxpayer, they knew only J. C. Penney. The city has assiduously avoided making any defense of this license. Now Supernumerary Circuit Judge Simmons refuses to consider the federal rights of taxpayer sought to be protected here by ignoring well settled rules of procedure to dispose of the case on an alleged local ground by a spurious application of the doctrine of "standing".

Rightly or wrongly it is alleged in the Bill that it is taxpayer who has a controversy with the city about the application of paragraph (d) of the amended city license to taxpayer's activities. The city gave a bill **to taxpayer** for this license, which was addressed to J. C. Penney Company. This does not and cannot mean that therefore the only controversy over the license is with Penney. If the allegations of the Bill are to be believed, taxpayer still has a controversy with the city about this license. It didn't take the tax bill to create a controversy, and its existence does not prevent taxpayer from obtaining a

declaratory judgment if there is a justiciable controversy between taxpayer and city. The mere demand for a license by the license commissioner creates a justiciable controversy.

Brown v. Southern Cigarette Co., 269 Ala. 539, 114 So. 2d 387 (1959). Hence, the addressee of the tax bill was completely irrelevant.

Furthermore, it was taxpayer's employee's liberty jeopardized here, and taxpayer's money involved. This is certainly a controversy and a justiciable one.

Supernumerary Circuit Judge Simmons HELD that

> "Without the presence of Penney Company as a party to this suit, a judgment herein sustaining the validity of the ordinance and its application to Penney Company, would be without binding force on said company."

Since it is alleged in the Bill of Complaint that Penney is licensed by the City as a "studio photographer", and since a "studio photographer" is exempt from the license covered by paragraph (d), and since it is alleged that Penney does not take photographs nor offer photography service, neither the city nor Supernumerary Circuit Judge Simmons can apply this license to Penney much less make it of "binding force on said company," and insofar as we know, no one has attempted to. Hence, Penney is not only not a necessary party in this suit; it is not even a proper party.

All of this permitted the State court to follow the lead of the city and not pass on the validity of this license, even though taxpayer's rights under the Federal Constitution are violated.

1.

Decision on Taxpayer's Rights Under the Federal Constitution Cannot Be Avoided in State Courts by Spurious Application of State Rules.

In **Terre Haute & Indianapolis R. Co. v. Indiana,** 194 U. S. 579, 589 (1904) where the state court construed a state statute in a fashion held to be untenable but thereby avoiding review of the federal constitutional questions invoked, Justice Holmes said for the unanimous court:

> "We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court."

In **Ward v. Love County,** 253 U. S. 17, 22 (1920) this was expanded with language particularly apt in the case at bar:

> "The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the supreme court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support."

In **Davis v. Wechsler,** 263 U. S. 22, 24 (1923) the state court held that a defense of wrong venue was waived under circumstances which did not seem appropriate to

this Court, Justice Holmes added to the ideas stated above:

> "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

This was summed up in **First Nat. Bank v. Anderson**, 269 U. S. 341, 346 (1926):

> "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law; and where a case coming from a state court presents that question, this court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court."

In **Allied Stores v. Bowers**, 358 U. S. 522, 525 (1959), this Court held that the question presented here (viz., standing to test the constitutionality of a state tax) was for determination by this Court, and this Court was not bound by the state court's holding of no standing by the taxpayer to raise the question.

Accord:

Mitchell v. Clark, 110 U. S. 633, 645 (1884);
Boyd v. Nebraska, 143 U. S. 135, 180 (1892);
Covington & Lexington Turnpike v. Sandford, 164 U. S. 578, 595 (1896);
Carter v. Texas, 177 U. S. 442, 447 (1900);
Lovell v. Griffin, 303 U. S. 444, 450 (1938).

A previous effort by the Supreme Court of Alabama to forestall protection of constitutional rights was thwarted by this Court in:

N. A. A. C. P. v. Alabama, 357 U. S. 449, 454-458 (1958);

N. A. A. C. P. v. Alabama, 377 U. S. 288, 293-302 (1964).

Since it is plainly alleged in the Amended Bill of Complaint:

(1) That taxpayer's employee's liberty was threatened under this license

(2) That taxpayer's money is jeopardized by this license

(3) That the license was imposed to bar taxpayer for engaging in interstate activity in Mobile

taxpayer has standing to raise the question whether or not the license infringes taxpayer's constitutional rights. The decision by the state court that taxpayer cannot raise questions of the constitutionality of this ordinance is not binding on this Court, and this Court should therefore consider whether or not this license can withstand attack under the Federal Constitution.

2.

Licenses Used to Discriminate Against Interstate Commerce Are Invalid Under the Commerce Clause.

The Amended Bill of Complaint alleges that paragraph (d) of the photographer's license in question is aimed at and discriminates against interstate activity consisting of solicitation of orders and subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce. The original city photogarpher's license applied to:

(1) studio photographers at an established place

(2) photographers using animals as a prop.

(3) photographers of pedestrians on the street

(4) all other photographers, defined to be transient photographers.

This license was amended with a catch-all provision, paragraph (d), to cover all other photographers who were not

(a) studio photographers, or

(b) transient or itinerant photographers.

This license was fixed at $50.00 per day, which made it prohibitory. It was further alleged that this paragraph (d) had been applied only to the activities of taxpayer which were interstate activities. Hence, the question arises: can a city impose discriminatory licenses on interstate activity?

Regardless of the right of states or cities to impose non-discriminatory taxes or licenses on interstate activity, as in **Portland Cement Co. v. Minnesota,** 358 U. S. 450 (1959), it was recognized, even in that case, 358 U. S. 458:

> "It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. Gibbons v. Ogden, 9 Wheat. 1. In keeping therewith a State 'cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers. Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 493, 494. Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce, Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602. Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage

to local business, Memphis Steam Laundry Cleaners, Inc. v. Stone, 342 U. S. 339; Nippert v. Richmond, 327 U. S. 416, or by subjecting interstate commerce to the burden of 'multiple taxation', Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157; J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307. Such impositions have been stricken because the States, under the Commerce Clause are not allowed 'one single-tax worth of direct interference with the free flow of commerce.' Freeman v. Hewitt, 329 U. S. 249, 256."

In **Sprout v. South Bend**, 277 U. S. 163, 171 (1928), Justice Brandeis stated:

"But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

This has been quoted approvingly many times.

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470 (1931);

Cooney v. Mountain States Telephone, etc., Co., 294 U. S. 384, 393 (1935);

Pacific Telephone, etc., Co. v. Tax Commission, 297 U. S. 403, 414 (1936).

See also:

Portland Cement Co. v. Minn., 358 U. S. 450, 486 (1959), Dissenting Opinion.

Had paragraph (d) expressly provided that it applied exclusively to non-residents engaged in photography in

Mobile, such as taxpayer, thereby imposing a $50.00 a day license on them from which others would be exempt, this would seem to fall under the interdiction of

Mullaney v. Anderson, 342 U. S. 415 (1952).

See also:

Toomer v. Witsell, 334 U. S. 385 (1948).

In **Bethlehem Motors v. Flynt**, 256 U. S. 421 (1921), a privilege license on manufacturers classified according to residence which discriminated against non-residents was held invalid under the Commerce Clause.

Since it is alleged in the Bill in this case that paragraph (d) has been applied only to taxpayer who is engaged in interstate activity, it seems clear that the license is being applied discriminatorily against interstate activity. Since such is constitutionally permissible where the legislature so discriminates, it should also be impermissible when achieved by the administrative officials.

Therefore, the question here is substantial, and should be answered by this Court.

3.

Interstate Commerce Cannot Be Licensed by Cities.

Though paragraph (d) was conceived and created to discriminate, it was also created and is maintained to apply to interstate commerce. In other words, the City has decided to license interstate commerce, notwithstanding T. 37, Code of Ala., sec. 735, and Section 16 of the License Code of Mobile (set out in the Bill of Complaint in this case) which prohibit such.

The unconstitutionality under the Commerce Clause of license on interstate commerce was established in a case by the predecessor of the City, viz., **Leloup v. Port of Mobile**, 127 U. S. 640, 648 (1888), and this uncon-

stitutionality of licenses on interstate commerce applied "even though the same amount of tax should be laid on domestic commerce", **Robbins v. Taxing District**, 120 U. S. 489, 497 (1887). This was expressed in **Crutcher v. Kentucky**, 141 U. S. 47, 58 (1891):

> "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

The leading case on this today is **Spector Motor Service v. O'Connor**, 340 U. S. 602, 608, 609 (1951), where it was pointed out that even non-discriminatory licenses on interstate commerce are invalid.

Accord:

Barrett v. New York, 232 U. S. 14, 31 (1914);
Memphis Steam Laundry v. Stone, 342 U. S. 389, 392, 393 (1952).

See also:

Lily & Co. v. Sav-on-Drugs, 366 U. S. 276, 278, 279 (1961).

The City of Mobile should be no more successful this time in licensing interstate commerce than it was in 1888. Hence, this case should be reviewed by this Court, and reversed.

4.

The Right of a State to Fractionalize Interstate Activity and License Essential Components Should Be Finally Determined by This Court in This Case.

(1) The decision of the Supreme Court of Alabama on this question is probably wrongfully decided.

This Court held in **Nippert v. Richmond**, 327 U. S. 416, 423 (1946), that interstate activity cannot be fractionalized

and the local solicitation taxed. This is quoted in the Jurisdictional Statement in the case of **Dunbar-Stanley Studios, Inc. v. Alabama,** appealed herewith.

The Supreme Court of Alabama has held in **Dunbar-Stanley Studios v. Alabama,** ... Ala. ..., 210 So. 2d 696 (1968), and in **Family Discount Stamp Co. v. State,** 274 Ala. 322, 148 So. 2d 218 (1962), that interstate activity may be broken down into parts and the parts taxed separately without running afoul of the Commerce Clause.

Therefore, this Court should review this case and decide which of these positions can endure under the Commerce Clause.

(2) **The question should be finally determined.**

Even if it should be held that the Alabama cases cited above are not in conflict with the decisions of this Court, nevertheless the question should be finally disposed of. Unless this Court reviews this question and settles it now it will undoubtedly return time and again for decision. For it is hardly probable that Alabama will not stretch further this doctrine. Furthermore, other States will no doubt follow.

Hence, the question must be answered. We suggest that these cases can best present it.

5.

A Flat Per Diem Admission Privilege License Cannot Be Imposed on Interstate Activity.

When such a license applied to both interstate and intrastate activity, it was held to be invalid in **West Point Grocery Co. v. Opelika,** 354 U. S. 390 (1957), under the Commerce Clause. The license under sub-paragraph (d) of the City Photographer's License has been applied only to interstate activity. *A fortiori* such license is invalid under the Commerce Clause.

We read **Leloup v. Port of Mobile**, 127 U. S. 640, 648 (1888), as so holding, together with the cases set out in the Sections hereof designated 2 and 3.

6.

The Overwhelming Weight of Authorities Hold That Such Privilege Licenses as Are Here Involved Are in Violation of the Commerce Clause.

These licenses on the photography business and its parts have been reviewed by many courts in many states. They have been almost uniformly stricken down. One of the leading cases is **Olan Mills, Inc. v. City of Tallahassee**, ...Fla. ...., 100 So. 2d 164 (1958), **cert. den.** 359 U. S. 924. Most of these cases are collected in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961). See also the Note in 7 A. L. R. 2d 416 (1949). The facts in this very case were involved in **Dunbar-Stanley Studios v. Breen**, a copy of the opinion is set out in the Appendix to the Jurisdictional Statement in the accompanying appeal in the case of **Dunbar-Stanley Studios v. Alabama.**

7.

Privilege Licenses Enforceable With Criminal Sanctions Must Satisfy Substantive Due Process.

The Mobile photographer's license provides for enforcement by applying criminal sanctions. The failure to obtain a license where required is a misdemeanor. Hence, the acts done without a license are made crimes. This presents the question of whether or not the provisions of paragraph (d) satisfy the requirements of substantive due process as to vagueness and imprecision.

In **Raley v. Ohio**, 360 U. S. 423, 438 (1959) this Court said:

"A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them."

See also:

Ashton v. Kentucky, 384 U. S. 195, 200 (1966) f. n. 1; Annotation in 16 L. ed. 2d 1231.

Paragraph (d) is not only infected with patent vagueness, it suffers from being a "catch-all" ordinance which has been condemned.

See:

Bates v. Little Rock, 361 U. S. 516, 526 (1960) f. n. 11.

The State cases arriving at the same conclusion are collected in 134 A. L. R. 841.

Paragraph (d) activity under the Mobile photographer's license quoted herein, would also catch paragraph (b) and (c) activity since they are not excluded from (d). Such imprecision in imposing criminal sanctions is what the due process clause prohibits.

Since the paragraph (d) conduct subject to criminal sanctions, is in language so vague and undefined as to afford no fair warning of what conduct might transgress it, the question for review in this case is substantial and should be determined.

8.

A Copy of the Opinion Delivered Upon the Rendering of the Judgment Sought to Be Reviewed Is Attached Hereto as Exhibit A.

9.

A Copy of the Order of the Supreme Court of Alabama Appealed From Is Attached Hereto as Exhibit B.

Respectfully submitted,

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Certificate of Service.

I, J. Edward Thornton, an attorney and member of the Bar of this Court, one of the attorneys of record for Dunbar-Stanley Studios, Inc., a corporation, Appellant herein, certify that I served a copy of the foregoing Jurisdictional Statement on Hon. Fred Collins, Attorney for the City of Mobile, Appellee herein, by depositing the same in a United States mail box, with first class postage prepaid, addressed to him as counsel of record at his post office address on the 5th day of August, 1968.

J. Edward Thornton,
Attorney.